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No. 84-361

IN THE

Supreme Court of the United States

October Term, 1984

DAVID E. KEMPNER,

Appellant,

v.

DEARBORN LOCAL 2077, CITY OF DEARBORN SUPERVISORY TECHNICAL AND PROFESSIONAL EMPLOYEES, AFSCME, AFL-CIO

and

METROPOLITAN COUNCIL 25, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO,

Appellees.

On Appeal From The Court Of Appeals
Of Michigan

APPELLEES' MOTION TO DISMISS

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

I.

IS DUE PROCESS OF LAW DENIED, AND ARE THE FIRST AMENDMENT FREEDOMS OF ASSOCIATION AND PETITION IMPERMISSIBLY ABRIDGED, BY A STATE'S PUBLIC-SECTOR AGENCY SHOP STATUTORY PROVISIONS WHICH, AS APPLIED BY THE STATE'S ADMINISTRATIVE AGENCIES AND COURTS, REQUIRE OBJECTING NON-MEMBER SERVICE FEE PAYORS TO EXHAUST INTERNAL UNION PROCEDURES TO RECEIVE THEIR FINALLY CALCULATED UNION REDUCTION OF SERVICE FEE, AS A PRE-CONDITION TO SECURING STATE ADMINISTRATIVE AGENCY AND COURT REVIEW OF THEIR ALLEGED STATUTORY AND/OR CONSTITUTIONAL RIGHTS?

II.

DO A STATE'S ADMINISTRATIVE AGENCIES AND COURTS PROPERLY APPLY THE STATE'S PUBLIC-SECTOR AGENCY SHOP STATUTORY PROVISIONS BY REQUIRING UNIONS, WITH REFERENCE TO OBJECTING NON-MEMBER SERVICE PAYORS, TO (a) INTERNALLY CALCULATE A PROSPECTIVE SERVICE FEE REDUCED "BY THE PERCENTAGE OF THE UNION'S ANNUAL BUDGET SPENT FOR IDEOLOGICAL OR POLITICAL PURPOSES UNRELATED TO COLLECTIVE BARGAINING" AND, IN SO DOING, MAKE "A GOOD FAITH APPLICATION OF CURRENT CASE LAW"; TO (b) THEREUPON PERMIT THE UNION TO REQUIRE "THE OBJECTING NON-MEMBER" TO "COMMENCE PAYING A REDUCED FEE" DIRECT TO THE UNION AND *NOT* INTO ESCROW: BY REQUIRING OBJECTING NON-MEMBERS, IF THEY STILL OBJECT TO THE REDUCED FEE CALCULATIONS TO (c) NEXT EXHAUST INTERNAL APPEAL PROCEDURES, BEFORE (d) THEN HAVING OPPORTUNITY TO FURTHER CHALLENGE THOSE CALCULATIONS AT THE STATE'S ADMINISTRATIVE LABOR RELATIONS AGENCY AND, THEREAFTER, IN THE STATE'S APPELLATE COURTS?[1]

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[1] Decision and Order of Michigan Employment Relations Commission, March 11, 1982, at pp. 12a-14a of Jurisdictional Statement.

TABLE OF CONTENTS

	Page
Counter-Statement of Questions Presented	i
Table of Authorities	iv
Motion to Dismiss	1
Counter-Statement of the Case	2
Argument:	
QUESTION I	7
QUESTION II	9
Conclusion	17

TABLE OF AUTHORITIES

Cases: Page

Abood v *Detroit Board of Education*, 431 U.S. 209 (1977) 8, 11

Aio v *Hamada*, 664 P. 2d 722 (Hawaii, 1983) . . . 11

Association of Capitol Powerhouse Engineers v *State*, 89 Wash. 2d 177, 570 P. 2d 1042 (1977) 13

Ball v *City of Detroit*, 84 Mich. App. 383, 269 N.W. 2d 607 (1978) 3, 6

Berns v *Wisconsin Employment Rel. Comm.*, 99 Wis. 2d 252, 299 N.W. 2d 248 (1980) 13

Brotherhood of Railway & Steamship Clerks v *Allen*, 373 U.S. 113 (1963) 8

Browne v *Milwaukee Bd. of School Directors*, 83 Wis. 2d 316, 265 N.W. 2d 559 (1978) 13

Carlson v *City of Portland*, 45 Ore. App. 439, 608 P. 2d 1198 (1980) 12

Champion v *State of Calif.*, 738 F. 2d 1082 (9th Cir., Jul. 30, 1984) 12

Detroit Board of Education v *Parks*, 417 Mich. 268, 335 N.W. 2d 641 (1983) 13

Dudkin v *Civil Service Comm.*, 127 Mich. App. 397, 339 N.W. 2d 190 (1983) 13

Eastern Michigan AAUP v *Morgan*, 100 Mich. App. 219, 298 N.W. 2d 886 (1980) 13

Ellis v *Railway Clerks*, __ U.S. __, 104 S. Ct. 1883 (1984) 10, 11, 15

Fort Wayne Education Ass'n v *Goetz*, 443 N.E. 2d 364 (Ind. Ct. App., 1982) 12

Page

Fort Wayne Education Ass'n v *Goetz*, 443 N.E. 2d 364 (Ind. Ct. App., 1982) 12

Haag v *Hogue*, 456 N.Y.S. 2d 978 (Sup. Ct., Monroe County, 1982) 11

Hudson v *Chicago Teachers Union, Local No. 1*, 573 F. Supp. 1505 (N.D. Ill., 1983), rev'd. __ F. 2d __ (7th Cir., Sep. 6, 1984) 8

Jefferson Area Teachers Ass'n v *Lockwood*, 69 Ohio St. 2d 671, 433 N.E. 2d 604 (1982) 12

Kennerly v *United States*, 721 F. 2d 1252 (9th Cir., 1983) 8

Leek v *Washington Unified School Dist.*, 124 Cal. App. 3d 41 (Cal. Ct. App., 1981) 12

Link v *Antioch Unified School Dist.*, 191 Cal. Rptr. 264 (Cal. Ct. App., 1983) 12

McDonald v *City of West Branch*, 466 U.S. __, 104 S. Ct. 1799 (1984) 9

New Prairie Classroom Teachers v *Stewart*, 460 N.E. 2d 149 (Ind. App., 1983) 12

Robinson v *New Jersey*, __ F. 2d __ (3rd Cir., 1984) 10

San Lorenzo Education Ass'n v *Wilson*, 179 Cal. Reptr. 25 (Cal. Ct. App., 1981) 12

Siegel v *Gresham Grade Teachers Ass'n*, 32 Ore. App. 551, 574 P. 2d 692 (1978) 12

Therrien v *Labor Relations Comm.*, 390 Mass. 644, 459 N.E. 2d 88 (1983) 11

Tierney v *City of Toledo*, __ F. Supp. __, 116 LRRM 3475 (N.D. Oh., 1984) 8

Page

United University Professions v *Newman*, 446 N.Y.S. 2d 596 (N.Y. App. Div., 1982); 80 App. Div. 2d 23 (N.Y. App. Div., 1981); 430 N.Y.S. 2d 704 (N.Y. App. Div., 1980) 11

Warner v *Board of Education*, 104 Misc. 2d 1021 (Sup. Ct., Monroe County, N.Y., 1980) 11

White Cloud v *Board of Ed.*, 101 Mich. App. 309, 300 N.W. 2d 551 (1980) 13

Wolkenstein v *Reville*, 694 F. 2d 35 (2nd Cir., 1982) 8

Constitutional and Statutory Provisions:

United States Constitution:
First Amendment . . . . . *passim*
Fourteenth Amendment . . . . . *passim*

45 USC § 152 . . . . . *passim*

California State Employer-Employee Relations Act
West's Ann. Cal. Gov. Code § 3518.8
(as adopted in 1983) 12

Hawaii Public Employment Relations Act
Haw. Rev. Stat. § 89-4(a) 11

Illinois Educational and Public Labor Relations Acts
Illinois P.A. 1014, L. 1983, eff. 1/1/84 12
(S.H. Ill. Ann. Stat. Ch. 48, ¶ 1701 *et seq.*; ¶ 1711)
Illinois P.A. 1012, L. 1983, eff. 7/1/84 12
(S.H. Ill. Ann. Stat. Ch. 48, ¶ 1601 *et seq.*; ¶ 1606(e))

Indiana Cert. Educational Employee Bargaining Act
Ind. Stat. Ann. § 20-7.5-1-1, *et seq.* 12

Massachusetts Public Employee Relations Act
Mass. Ann. Law, C. 150 E § 12 11

Page

Michigan Public Employment Relations Act
Mich. Comp. Laws § 423.210 . . . . . *passim*

New York Civil Service Law (Taylor Act)
New York Civil Service Law § 208, subd. 3, ¶ [a] 11

Ohio Public Employment Relations Act
Oh. Rev. Code § 4117.09 (c) 12

Oregon Public Employment Relations Act
Ore. Rev. Stat. § 243.650(10) and (16) 12

Wisconsin State and Municipal
Employment Labor Relations Act
Wisc. Stat. Ann. §§ 117.70(2) and 111.85 . . . 13

Other Authorities:

Decision of Robben W. Fleming, Chairperson of Citizens Review Committee, Michigan State Employees Association, *In the Matter of the Agency Shop Policy of the Michigan State Employees Association*, dated Mar. 26, 1984 and June 28, 1984 . . . . . 14, 15, 16

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MOTION TO DISMISS

Appellees, pursuant to Rule 16.1(b) of the Rules of the Supreme Court of the United States, move the court to dismiss the appeal herein on the following grounds:

1. The appeal does not present a substantial federal question.

2. The Decision and Order of the Michigan Employment Relations Commission rests on an adequate non-federal basis.

COUNTER-STATEMENT OF THE CASE

Ms. Christine D'Alleva became employed by the City of Dearborn on or about August 23, 1976; she was employed in a bargaining unit represented by AFSCME's Local 2077. The City and the Union had collective bargaining agreements which required the payment of agency shop fees equivalent to union dues. Ms. D'Alleva refused to pay either the union dues or agency shop fees.

On February 17, 1977, the local union president "pro forma" requested that Ms. D'Alleva be discharged for failure to pay service fees. The City took no action on the Union's request. Finally, after a couple of years, the City and the Union finally agreed to submit the issue to voluntary arbitration before George T. Roumell, Jr., a Detroit lawyer who works virtually full-time as a labor arbitrator. Mr. Roumell (as of this date, October, 1984) is the partner of Wallace Riley, the immediate Past President of the American Bar Association, and Mr. Roumell is, himself, the President-Elect of the State Bar of Michigan.

Reaching arbitration on June 6, 1979, Mr. Roumell, on August 28, 1979, issued an Arbitrator's Opinion and Award, saying in relevant part:

1. "The grievance is denied insofar as termination . . . is concerned."

2. "Christine D'Alleva shall pay to the Union a service fee per month for the period September 23, 1976 to the present and in the future which represents the proportion of Union expenditures related to 'contract administration', 'collective bargaining', and 'grievance adjustment' . . . ."

3. "Within thirty days . . . the Union shall calculate and present the Arbitrator and Ms. D'Alleva

> . . . the figures representing the proportion of service fee . . . for the period of September 23, 1976 to present, and estimated for next year. This provision of the Award will be satisfied if the Union presents the same calculations as presented to the City of Detroit following the decision in *Ball* v *City of Detroit*, 84 Mich. App. 383 (1978)."[2]

Subsequent to the Arbitrator's August 28 Opinion and Award, the undersigned attorney for the Union wrote to Mr. Roumell to report that no revised calculations had yet been presented in the *Ball* case, but that:

> ". . . , my clients and I are willing to do as follows, however. We enclose herewith a xerox copy showing the final rebate percentages for the International union for the period July, 1972 to December 31, 1977. In addition to that recapitulation, we understand that the International's rebate for calendar year 1978 has been computed as being at 8.79%. Dividing those percentages by the 7 time frames in question, comes up with an average percentage of final rebate for the International Union, in the amount of 6.6%.
>
> Although the Council and the Local Union are servicing organizations, to a much greater extent than the International Union; and although, the International Union spends a much greater percentage of its monies on legislative activities and organizational activity, as compared to either the Council or the Local Union, we are willing that the 6.6% be applied to the total dues or service fee being paid, or to be paid in the future (at least until *Ball* is resolved), by Ms. D'Alleva.

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[2] Michigan Employment Relations Commission (hereinafter MERC) Joint Exhibit 11.

If this suggestion is satisfactory to the Arbitrator, I note that you have retained jurisdiction 'to rule on any questions concerning (the) Award', and I would assume that you could amend or supplement your Award consistent with this proposal.

* * *

A REVIEW OF AFSCME INTERNATIONAL REBATES UNDER ARTICLE IX, SECTION 10 OF AFSCME INTERNATIONAL CONSTITUTION 1973-1978

Period	Per Cap	No. Requests	Calculations		Final Rebate		
7/1/72 to 6/30/73	$18.00	c. 50	$ .83	4.63%	$ .83	No Appeal	4.6%
7/1/73 to 6/30/74	$18.00	83	$ .86	4.78%	$2.02		11.0%
7/1/74 to 6/30/75	$21.75	64	$ .57	2.62%	$ .57	No Appeal	2.62%
7/1/75 to 6/30/76	$27.30	110	$ .88	3.22%	$1.77		6.48%
7/1/76 to 12/31/76	$14.40	88	$ .94	6.55%	$ .94	No Appeal	6.5%
1/1/77 to 12/31/77	$34.80	495	$2.16	6.22%	$2.16	Appeal Withdrawn" [3]	6.2%

The arbitrator responded to Maurer's September 20 letter (and other correspondence from Ms. D'Alleva) by setting a further hearing for October 31, 1979. At that hearing, the International Union's non-member rebate review procedure was explained.[4] It was noted during the arbitration hearing that, on September 1, 1977, the International Union's Review Panel issued a lengthy decision, for example, reviewing the fiscal 1973-74 rebate figure and setting guidelines and principles for the future. The Review Panel declared that the rebate for that 1973-74 year should be 11% of international union per capita dues. The Review Panel then consisted of Chairperson

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[3] MERC Joint Exhibit 12, Maurer's letter of September 20, 1979 to Arbitrator Roumell.

[4] See Article XII, AFSCME International Constitution, Appendix F, pp 53a-54a, Jurisdictional Statement herein.

Ronald W. Haughton (former Wayne State University Vice-President and later Chairperson and now member of the Federal Labor Relations Authority); member Harry T. Edwards (former law professor at Harvard and the University of Michigan, and now a Judge of the Court of Appeals for the District of Columbia Circuit); and member David A. Morse (former U.S. Assistant Secretary of Labor; former General Counsel of the National Labor Relations Board; former Director-General of the International Labor Organization, Geneva, Switzerland).

On December 4, 1979, Arbitrator Roumell issued a Supplemental Opinion and Award. He noted that the Union "agreed to waive all service fees prior to July 1, 1977" (i.e. from September 23, 1976 to July 1, 1977). He noted that total dues were $8.00 per month ($2.40 to AFSCME International, $4.00 to the servicing Council, and $1.60 to the local union) from September 23, 1976 to June 1, 1979, and $9.00 per month thereafter. He noted that, during the October 31 hearing, the Union proposed and Ms. D'Alleva accepted a 6.6% "rebate" or reduction figure, but that Ms. D'Alleva objected to any retroactivity at all. He noted that the Union was agreed that payment, (retroactive only to July 1, 1977, and thereafter payable at only 93.4% of regular dues), those back payments could be made in 12 equal future monthly installments *to the Union* (along with payment of future current monthly dues at the 93.4% rate). The Arbitrator thus concluded that Ms. D'Alleva owed back service fee of $229.74 (24 months, 6/1/77-5/31/79, times $7.47 [$8.00 minus 6.6%] equals $179.28, plus 6 months, 6/1/79-11/30/79, times $8.41 [$9.00 minus 6.6%] equals $50.46). The Arbitrator noted that November service fee was not due and payable until after December 4, 1979, and he thus directed:

> "1. Ms. Christine D'Alleva owes $229.74 in retroactive service fees to Local 2077 . . . .

2. The retroactivity is to be paid beginning January 2, 1980, with payment due by the 20th of each month in eleven equal installments of $19.15, and a final installment of $19.09.

3. Ms. Christine D'Alleva is to pay the current December 1979 service fee by December 20, 1979, to Local 2077. . . . said service fee will be $8.41, based upon the 6.6 percent adjustment agreed to between Local 2077 and Christine D'Alleva . . . .

* * *

4. As to the service fees in the future beyond December 1979, said service fee may be adjusted from time to time by Local 2077 to reflect the costs of contract administration, collective bargaining and grievance adjustments as set forth in *Ball* v *Detroit*, 84 Mich App 383 (1978). In the event that Christine D'Alleva objects to the calculations, she is to utilize the appeal procedure for said objection established by the American Federation of State, County and Municipal Employees . . . ."[5]

Thus, by Union agreement and arbitral award, Ms. D'Alleva in the instant case was given not only a prospective rebate on future dues or service fee, but that same "rebate" was applied to 30 past months of unpaid service fee on top of which an additional 9 past months of unpaid service fee was completely, 100% waived. The Union neither sought nor was awarded interest on the past, unpaid service fee.

On December 4, 1979, counsel of record herein, Mr. Chappell, undertook representation of Ms. D'Alleva and

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[5] MERC Joint Exhibit 16.

refused on her behalf to make any payment of past, present or future service fee except into an escrow account.[6] The Union refused to join into such an escrow arrangement and, on January 22, 1980, Mr. Chappell and his local counsel, Mr. Kempner, unilaterally opened an "escrow" account at Detroit's City National Bank for Ms. D'Alleva, depositing $125.25 into said account ($100.00 down payment . . . , plus $9.00 for the January, 1980 service fees, plus $16.25 [one-twelfth of the remaining January 1, 1977 to December 31, 1979 service fees].)[7]

Effective July 15, 1981, Ms. D'Alleva resigned her position with the City of Dearborn "to accept other employment". Presumably, Mr. Chappell arranged other "escrow" payments on her behalf between January, 1980 and July, 1981; the Union has received no such payments, however, and, in fact, has never gotten a single penny from Ms. D'Alleva as relates to her nearly 5 years of union-represented employment.

ARGUMENT

This case represents total service fee (at 100% payment) of about $513.00 (from August 23, 1976 to July 16, 1981). Of that amount, by Union agreement and arbitral award, "rebates" (if that's the proper term to apply to *past, unpaid* service fees) and waived service fee of about $101.10 had already been gained by Ms. D'Alleva, or nearly 20% of total service fee dollars.

QUESTION I

The question of alleged constitutional violation because of required utilization of internal union procedures is adequately answered by the recent August 2, 1984 deci-

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[6] MERC Joint Exhibit 17.

[7] MERC Joint Exhibit 18, and MERC Transcript of February 4, 1980, at p. 28.

sion of a Magistrate sitting in the U.S. District Court for the Northern District of Ohio. In the case of *Tierney* v *City of Toledo*, 116 LRRM 3475, involving application of the Toledo Municipal Code's agency shop provision, it was held:

> "Plaintiffs' remaining contention that their due process rights are violated by requiring them to utilize an internal union procedure to receive their final refund from the TPPA does not appear to be supported by authority. A due process hearing need not take the form of a judicial proceeding. An administrative hearing with an impartial decision maker may suffice. See *Kennerly* v *United States*, 721 F.2d 1252, 1254 (9th Cir. 1983); *Wolkenstein, supra*, 694 F.2d at 41. The fact that the procedure is an internal union procedure does not make it inherently unfair. See *Hudson* v *Chicago Teachers Union, Local No. 1*, 573 F.Supp. 1505, 1516 (N.D. Ill. 1983). Indeed, in *Brotherhood of Railway Clerks* v *Allen*, 373 U.S. 113, 53 LRRM 2128 (1963), the Supreme Court suggested that unions consider the adoption by their membership of some voluntary plan by which fee paying dissenters would be afforded an internal union remedy. Id. at 122. More recently, in *Abood, supra*, without expressing a view as to the constitutionality of the internal remedy involved, the Court suggested that disputes over dissenting payors' fees should be referred to an internal union remedy as a possible means of settling any discord. Id. at 242. In light of these suggestions by the Supreme Court, this court is not presently inclined to hold that the internal union procedure herein is inherently unfair or in violation of due process."

Of course, in the instant case the facts involved an arbitral procedure, with an arbitrator jointly selected by the

City employer and the Union. As to such arbitration procedures, the Ohio magistrate noted:

> "Plaintiffs' contention that the arbitration process contained in the rebate procedure violates the Due Process Clause of the Fourteenth Amendment would also appear to be lacking in merit. In making this contention, the plaintiffs place substantial reliance upon the Supreme Court's recent decision in *McDonald* v *City of West Branch*, 466 U.S. __, 104 S.Ct. 1799, 115 LRRM 3646 (1984), for the proposition that private arbitrators never have any power or right to make fact findings or to determine legal issues of constitutional magnitude. While the plaintiffs' interpretation of *McDonald, supra*, is interesting, it is incorrect. In that case, the Supreme Court held merely that an unappealed arbitration decision would not be afforded res judicata or collateral estoppel effect when a civil rights action is brought to challenge it in a federal court. Id. at 1803. In so holding, the Court implied that arbitrators could pass upon matters effecting constitutional rights, but that their holdings or factual findings upon such matters would not be given preclusive effect."[8]

QUESTION II

As to the broader questions of prospective versus retroactive or "pure" rebates, escrow or no escrow, and

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[8] Compare the September 6, 1984 decision of the U.S. Court of Appeals for the Seventh Circuit, reversing *Hudson, et al.* v *Chicago Teachers Union Local No. 1, et al.*; note, however, that the Seventh Circuit says, in its opinion:

> "In *Robinson* v. *New Jersey*, the Third Circuit found that a 15 percent advance reduction for nonmembers of the union provided a sufficient cushion to protect them. * * * Here the advance reduction was only 5 percent."

In our instant case, the nonmember was offered and awarded a 20 percent reduction for total years of service.

types of or standards for rebatable expenditures, the Supreme Court decision in *Ellis* obviously answers some of those questions in the context of judicial interpretation of a federal statute. As the *Ellis* decision made clear, however, most issues were being decided on statutory grounds (involving the union security provisions of the Railway Labor Act) rather than on constitutional grounds.

As to whether or not *Ellis* holds that a rebate-only scheme is a statutory (Railway Labor Act) violation, or a constitutional violation, is a matter upon which there can be disagreement. A fair reading of *Ellis*, we think, permits one to conclude that it holds that a "rebate only" procedure is a statutory violation. The U.S. Court of Appeals for the Third Circuit, in its recent August 6, 1984 decision in *Robinson* v *New Jersey* reads *Ellis* as saying "a pure rebate system" is a constitutional violation.

In any event, in our instant case we would first note that neither the facts nor the appealed rulings involved a "pure rebate" system or "rebate only" system. To the contrary, with 9 months of 100% waived fees and 30 months of 6.6% reduced fees, the facts involved nearly a 30% "prospective" reduction as of December, 1979, and a 20% "prospective" reduction during the entire 5 year term of appellant's employment. The reduction was only theoretically "prospective" because, in fact, the objecting employee never, to this day, has paid anything to the Union, but has instead paid into some unilaterally established escrow account (established only after being arbitrally directed to pay the reduced sum directly to the Union). The appealed Decision and Order of the Michigan Employment Relations Commission spoke, as well, only to a prospectively reduced service fee, etc.

Thus, if *Ellis* addressed the issue of "rebate only" systems on constitutional grounds, we urge that the instant case does meet the "constitutional" standards enunciated by *Ellis*.

We would note further, however, that, although unnecessary to disposition of this Motion to Dismiss, the very Michigan statutory provision under consideration now, has previously been considered by this Court in *Abood* and there addressed in terms of constitutional considerations, little over 7 years ago. To the extent, if any, that *Ellis* is inconsistent with *Abood*, which decision should govern the state law, statutory agency shop provisions in Michigan? Suffice it to say for the present moment that Michigan's 1973 legislative history of the agency shop provision amendments is distinctly different than the 1950 Railway Labor Act union security amendment legislative history discussed in *Ellis*. In this context, we would also note that a number of legislative bodies, relying upon their reading of *Abood* and its predecessors, passed local laws that provided for retroactive rebates or refunds:

1. Massachusetts General Law, c. 150E, § 12, as interpreted by the Massachusetts Supreme Court on December 22, 1983 in *Therrien et al* v *Labor Relations Comm.*, 459 N.E. 2d 88.

2. New York Civil Service Law § 208, subd. 3, ¶ [a], as interpreted by the New York intermediate appellate courts in *United University Professions* v *Newman*, 446 N.Y.S. 2d 596 (N.Y. App. Div., 1982); 80 App. Div. 2d 23 (N.Y. App. Div., 1981); 430 N.Y.S. 2d 704 (N.Y. App. Div., 1980); and as interpreted by New York trial judges in *Haag* v *Hogue*, 456 N.Y.S. 2d 978 (Sup. Ct., Monroe County, 1982); and *Warner* v *Board of Education*, 104 Misc. 2d 1021 (Sup. Ct., Monroe County, 1980).

3. Hawaii's H.R.S. § 89-4(a), as interpreted by the Hawaii Supreme Court in *Aio* v *Hamada*, 664 P. 2d 727 (Hawaii, 1983).

4. An interpretation of the Indiana Certificated Educational Employee Bargaining Act, Ind. Stat. Ann. 20-7.5-1-1, *et seq.*, as interpreted by Indiana's intermediate Court of Appeals in *New Prairie Classroom Teachers* v *Stewart*, 460 N.E. 2d 149 (Ind. App., 1983); and *Fort Wayne Education Ass'n* v *Goetz*, 443 N.E. 2d 364 (Ind. App., 1982).

5. Ohio Revised Code § 4117.09 [c] and interpretations of earlier Ohio law in *Jefferson Area Teachers Ass'n* v *Lockwood*, 69 Ohio St. 2d 671, 433 N.E. 2d 604 (1982).

6. California's Gov. Code § 3518.8, as interpreted in *Champion* v *State of Calif.*, 738 F. 2d 1082 (9th Cir., 1984), and interpretations of earlier California law by its intermediate appellate courts in *Link* v *Antioch Unified School Dist.*, 191 Cal. Reptr. 264 (Cal. App., 1983); *San Lorenzo Educ. Ass'n* v *Wilson*, 179 Cal. Reptr. 25 (Cal. App., 1981); and *Leek* v *Washington Unified School Dist.*, 124 Cal. App. 3d 41 (Cal. App., 1981).

7. Illinois P.A. 1014, L. 1983, § 11, (S.H. Ill. Ann. Stat. Ch. 48, ¶ 1711), effective January 1, 1984, and Illinois P.A. 1012, L. 1983, (S.H. Ill. Ann. Stat. Ch. 48, ¶ 1606[e]), effective July 1, 1984.

8. Oregon's Ore. Rev. Stat. § 243.650(10) and (16), as interpreted by its intermediate appellate court in *Siegel* v *Gresham Grade Teachers Ass'n*, 32 Ore. App. 551, 574 P. 2d 692 (1978), and *Carlson* v *City of Portland*, 45 Ore. App. 439, 608 P. 2d 1198 (1980).

9. Wisconsin's state and municipal employment labor relations' acts, Wis. Stat. Ann. §§ 111.70(2) and 111.85, as interpreted by its Supreme Court in *Berns* v *Wisc. Employment Rel. Comm.*, 99 Wis. 2d 252, 299 N.W. 2d 248 (1980); and *Browne* v *Milwaukee Bd. of School Directors*, 83 Wis. 2d 316, 265 N.W. 2d 559 (1978).

The foregoing represents some nine different states, plus the State of Washington (as noted in *Ellis* footnote 7, in the case of *Association of Capitol Powerhouse Engineers* v *State*, 89 Wash. 2d 177, 570 P. 2d 1042 [1972]), and the State of Michigan (whose court interpretations of relevant statutory provisions can be found in *Detroit Bd. of Ed.* v *Parks*, 417 Mich. 268, 335 N.W. 2d 641 [1983]; *Dudkin* v *Civil Service Comm.*, 127 Mich. App. 397, 339 N.W. 2d 190 [1983]; *White Cloud Ed. Ass'n* v *Board of Ed.*, 101 Mich. App. 309, 300 N.W. 2d 551 [1980]; *Eastern Mich. AAUP* v *Morgan*, 100 Mich App. 219, 298 N.W. 2d 886 [1980]).

Thus, if the view of the law espoused by counsel for appellant were adopted by this Court, the state and local laws of some 11 different states, as interpreted by their courts, would be severely impacted if not indeed deemed unlawful. The result of such can, perhaps, be best illustrated by a recent decision and a supplemental decision of Robben W. Fleming. Dr. Fleming is currently a Professor of Labor Law at the University of Michigan. Previously, for some 12 years, he had served as President of the University of Michigan, and, before that as Chancellor and Professor of Law at the University of Wisconsin, as Professor of Law at the University of Illinois, and, before that, as Director of the Institutes of Labor and Industrial Relations at the Universities of Illinois and Wisconsin. Dr. Fleming also was recently appointed by the Michigan State Employees Association (hereinafter

MSEA) as Chairperson of its Citizens Review Committee, which is MSEA's final internal appellate tribunal governing its agency fee procedures. (Procedures involving Michigan's state civil service employees are not caught by general State legislation due to a ruling of the Michigan Supreme Court, some years ago, that the State's Civil Service Commission is a constitutionally autonomous body; those procedures are, instead, covered by Civil Service Rule.) In an initial decision issued on March 26, 1984, Professor Fleming noted:

> "Section 6-7 of the Rules of the Civil Service Commission authorizes the parties to a collective bargaining agreement to include in their contract a so-called 'Representation Service Fee' under which the parties may require, as a condition of continuing employment, 'that all employees in the unit pay to the exclusive representative a service fee representing the employees' proportionate share of the costs of exclusive representation.' The rules further provide that: 'Such costs shall not include fees, charges or assessments involving political contributions or for other purposes not directly related to the costs of representation under this rule and related procedures."

With reference to a retroactive rebate procedure, on March 26, Professor Fleming originally wrote:

> "Though there is some complaint on the part of either individual objectors or the National Right to Work Legal Defense Foundation to a retroactive rebate procedure rather than an immediate reduction in the representation fee, it does not seem possible at this point in time to do anything other than tender a rebate. It may be that with a little experience the Association can identify a percentage reduction which will accommodate all

rebatable items and therefore make a flat reduction possible. This may, in fact, be a wise approach."

In supplemental decision issued on June 28, 1984, Professor Fleming now wrote:

"On March 26, 1984, acting in my capacity as Chairman of the Citizens Review Board of the Michigan State Employees Association, I rendered a decision as to the rebatability of certain challenged items under the agency shop provision of the MSEA-State of Michigan collective bargaining contract. At the time of that decision there was pending before the Supreme Court of the United States the case of *Howard Eilis, et al, Petitioners* v. *Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees, et al,* 80 L. Ed 2d 428 (1984). That case was decided on April 25, 1984, and, as predicted, that decision now requires a review of the holding I made on behalf of the Citizens Review Committee in March.

In conducting the review, it is important to remember that there are two separate approaches which require consideration. One involves the question of whether the First Amendment rights of the non-members have been violated; the other is whether the language of the applicable statute in any way applies to the situation at hand. In the *Ellis* case the Supreme Court was dealing with the language of the federal Railway Labor Act, as amended in 1951. In the instant case we are dealing with Civil Service Commission rules of the State of Michigan which were enacted as the result of authorizing legislation. Thus the decision of the Supreme Court in *Ellis* is not applicable in-

sofar as it relies on the language of the Railway Labor Act for the decision. As to the proper interpretation of the United States Constitution, the Supreme Court is, of course the final authority."

* * *

"In the original decision of the Citizens Review Board, I had held that an after-the-fact rebate procedure was allowable, though I suggested that 'maybe with a little experience the Association can identify a percentage reduction which will accommodate all rebatable items . . . .'

While admitting that the lower courts were divided on the adequacy of a delayed rebate approach, the Supreme Court held that an after-the-fact rebate approach was inadequate. In its place the Court suggested 'readily available alternatives, such as advance reduction of dues and/or interest-bearing escrow accounts . . . .'

Though the Court seems to have grounded its decision in the statute it was considering, it is clearly desirable that there be uniformity of treatment in handling rebates, and I therefore amend the original decision of the Citizens Review Board to make it comply with the Court's decision in the *Ellis* case. That portion of the original decision is remanded to the Association in order to give it an opportunity to adopt an alternative which will conform to the Supreme Court's determination."

In terms of Professor Fleming's remarks, we would note that it is one thing to require a three-member state civil service commission to change its rules and/or to require a 20,000-member independent state employees' association to change its procedures. It is quite another matter, however, to try to have legislative bodies in some

11 different states change their laws. If the United States Constitution, as interpreted by the Supreme Court, requires same, so be it. Before so deciding, however, we would urge that the exaggerated arguments of counsel for appellant, in the present case, be substantially disregarded.

Finally, we would repeat briefly again that, regardless of whether or not *Ellis* applies to consideration of *state* statutory provisions, the essence of this present case, factually and legally, is that there was not a mere "after-the-fact rebate procedure or scheme". There was an advance reduction of dues proposed. There is, we would urge, no constitutional requirement of *both* an advance reduction of dues *and* a 100% escrow of the reduced balance, as counsel for appellant, in effect, assert in their Jurisdictional Statement. We would urge that a prospective reduction, coupled with a retroactive rebate of any *de minimus* contested amount, if any, satisfies constitutional requirements.

CONCLUSION

We would respectfully urge that the instant matter presents no substantial federal question, and rests on an adequate nonfederal basis, and counsel for appellees respectfully prays that this appeal be dismissed.

Respectfully submitted,

/s/ GEORGE M. MAURER, JR.
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